



# ANNOUNCEMENT

from the Copyright Office, Library of Congress,  
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

FINAL REGULATIONS.

## MECHANICAL AND DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING

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### LIBRARY OF CONGRESS

#### Copyright Office

#### 37 CFR Part 255

[Docket No. 96-4 CARP DPRA]

#### Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding

**AGENCY:** Copyright Office, Library of  
Congress

**ACTION:** Final regulations.

**SUMMARY:** The Copyright Office of the Library of Congress is announcing final regulations setting the rate for the delivery of digital phonorecords in general and deferring until the next scheduled rate adjustment proceeding further consideration of the royalty rate for the delivery of a digital phonorecord where the reproduction or distribution

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is incidental to the transmission which constitutes a digital phonorecord delivery.

**EFFECTIVE DATE:** January 1, 1998.

#### FOR FURTHER INFORMATION

**CONTACT:** David O. Carson, General Counsel, or Tanya M. Sandros, Attorney Advisor, Copyright Arbitration Royalty Panel ("CARP"), P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 252-3423.

#### SUPPLEMENTARY INFORMATION:

On November 1, 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("Digital

Performance Act"). Pub. L. 104-39, 109 Stat. 336. Among other things, the Act confirms and clarifies that the scope of the statutory license to make and distribute phonorecords of nondramatic musical compositions, 17 U.S.C. 115, includes the right to distribute or authorize distribution by means of a digital transmission which constitutes a "digital phonorecord delivery." 17 U.S.C. 115(c)(3)(A).

A "digital phonorecord delivery" is defined as "each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording \* \* \*" 17 U.S.C. 115(d).

The Digital Performance Act established that the rate for all digital phonorecord deliveries ("DPDs") made or authorized under a compulsory license on or before December 31, 1997, was the same as the rate in effect for the making and distribution of physical phonorecords for that period. 17 U.S.C. 115(c)(3)(A)(i). For digital phonorecord deliveries made or authorized after December 31, 1997, the Digital Performance Act established a two-step process for determining the terms and rates; either the copyright owners of nondramatic musical works and those persons entitled to obtain a license may negotiate the rates and terms for the statutory license, or they may participate in a Copyright Arbitration Royalty Panel ("CARP") proceeding. 17 U.S.C. 115(c)(3)(A)-(D). In a CARP proceeding, the parties present evidence to a panel of three arbitrators who, based upon the written record, write a report for the Librarian of Congress in which the CARP sets out its determination concerning the appropriate rates and terms. 17 U.S.C. 802(c) and (e).

The Librarian initiated the voluntary negotiation period for this rate setting

proceeding on July 17, 1996, and directed it to end on December 31, 1996. 61 FR 37213 (July 17, 1996). At the same time, the Librarian announced a schedule for a CARP proceeding in case the interested parties were unable to reach an industry-wide agreement through the negotiation process. The Librarian vacated this schedule and a second schedule for a CARP proceeding at the request of the negotiating parties, Recording Industry Association of America ("RIAA"), the National Music Publishers' Association, Inc. ("NMPA"), and The Harry Fox Agency, Inc. ("Harry Fox"). 61 FR 65243 (December 11, 1996); 62 FR 5057 (February 3, 1997).

Ultimately, these parties reached a voluntary agreement which they submitted to the Librarian of Congress on November 5, 1997, pursuant to 37 CFR 251.63(b). Section 251.63(b) allows the Librarian to adopt rates and terms embodied in a proposed settlement without convening an arbitration panel, if after conducting a notice-and-comment proceeding, no party with an intent to participate in a CARP proceeding files a substantive comment opposing the proposed regulations. See e.g., 62 FR 63502 (December 1, 1997) (proposing regulations setting rates and terms for the section 118 license). Accordingly, the Librarian published the proposed rates and terms for digital phonorecord deliveries for public comment. 62 FR 63506 (December 1, 1997).

Three parties filed comments in response to the proposed terms and rates: the United States Telephone Association ("USTA"), the Coalition of Internet Webcasters ("Webcasters"), and Broadcast Music, Inc. ("BMI"). These comments served to identify heretofore unknown parties who have a significant interest in the setting of the rates and terms for the delivery of digital phonorecord deliveries. Consequently, the parties entered a new round of negotiations in an attempt to resolve the commenters'

concerns and reach a mutually acceptable industry-wide agreement.

During the second phase of negotiations, the NMPA, SGA, and RIAA submitted a memorandum to the Copyright Office requesting that it adopt the unopposed rate for the delivery of digital phonorecords in general and the schedule for future rate adjustment proceedings set forth in its November 5, 1997, agreement, and that it either adopt the proposed rates and terms for incidental digital phonorecord deliveries set forth in the proposed regulations or sever and defer further consideration of these rates and terms until the next rate adjustment proceeding. The Copyright Office then offered the parties who had filed a Notice of Intent to Participate an opportunity to comment on the memorandum. See Order, Docket No. 96-4 CARP DPRA (October 16, 1998).

USTA responded that its concerns were fully addressed by the memorandum; and the three performing rights organizations, ASCAP, BMI, and SESAC, filed a joint comment which generally supported the recommendations outlined in the NMPA/SGA/RIAA memorandum, provided that the final regulations included a provision recognizing that the section 115 license does not affect in any way the public performance rights granted under 17 U.S.C. 106(4). Similarly, the Webcasters filed comments which supported the adoption of the rate and terms for digital phonorecord deliveries in general and the suggestion to sever and defer further consideration of rates and terms for incidental DPDs until the next rate adjustment proceeding with two modifications. First, the Webcasters sought an amendment to the proposed rules that would allow a party to petition the Copyright Office for a proceeding to set a rate for the transmission of an incidental digital phonorecord delivery prior to the next scheduled date. Second, the Webcasters requested that no rate be set for the incidental DPDs prior to the completion of a study required by Congress under section 104 of the Digital Millennium Copyright Act of 1998 ("DMCA"), subject to the right to petition for an interim rate adjustment proceeding.

In reply comments, NMPA/SGA/RIAA agreed to the ASCAP/BMI/SESAC suggestion for a clarification and the Webcasters' suggestion for a right to petition for a rate adjustment proceeding for incidental DPDs during the interim period. However, they did not support the Webcasters' request to postpone the rate adjustment proceeding for incidental DPDs until the Office completes its study on the operation of sections 109 and 117 of the Copyright Act, 17 U.S.C., as effected by Title I of the DMCA.

On December 4, 1998, the NMPA/SGA/RIAA submitted a second joint petition for adjustment of digital phonorecord delivery

royalty rates, incorporating the proposed modifications except for the suggestion to postpone the rate adjustment proceeding until the completion of the study. The petition was filed pursuant to 17 U.S.C. 115(c) and 803(a) and 37 CFR 251.63(b). Section 251.63(b) allows the Librarian to adopt the proposed rates and terms at the conclusion of an unopposed notice-and-comment rulemaking proceeding. This being so,

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the Copyright Office requested public comment on the proposed rates and terms in a notice published in the Federal Register. 63 FR 71249 (December 24, 1998).

The Copyright Office received no comments opposing the rates and terms for the delivery of digital phonorecords set forth in the December 24, 1998, Federal Register notice. Therefore, by this notice, the Librarian is adopting and the Copyright Office is announcing final regulations which set the rate for the delivery of digital phonorecords in general and defer until the next scheduled rate adjustment proceeding further consideration of the royalty rate for the delivery of a digital phonorecord where the reproduction or distribution is incidental to the transmission which constitutes a digital phonorecord delivery.

#### List of Subjects in 37 CFR Part 255

Copyright, Recordings.

For the reasons set forth in the preamble, the Library amends 37 CFR part 255 as follows:

#### **PART 255—ADJUSTMENT OF ROYALTY PAYABLE UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS**

1. The authority citation for part 255 continues to read as follows:

**Authority:** 17 U.S.C. 801(b)(1) and 803.

2. Revise §255.5 to read as follows:

#### **§255.5 Royalty rate for digital phonorecord deliveries in general.**

(a) For every digital phonorecord delivery made on or before December 31, 1997, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 6.95 cents, or 1.3 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) For every digital phonorecord delivery made on or after January 1, 1998, except for digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, as specified in 17 U.S.C. 115(c)(3)(C) and

(D), the royalty rate payable with respect to each work embodied in the phonorecord shall be the royalty rate prescribed in Sec. 255.3 for the making and distribution of a phonorecord made and distributed on the date of the digital phonorecord delivery (the "Physical Rate"). In any future proceeding under 17 U.S.C. 115(c)(3)(C) or (D), the royalty rates payable for a compulsory license for digital phonorecord deliveries in general shall be established de novo, and no precedential effect shall be given to the royalty rate payable under this paragraph for any period prior to the period as to which the royalty rates are to be established in such future proceeding.

3. Add §§255.6 through 255.8 to read as follows:

#### **§255.6 Royalty rate for incidental digital phonorecord deliveries.**

The royalty rate for digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes a digital phonorecord delivery, as specified in 17 U.S.C. 115(c)(3)(C) and (D), is deferred for consideration until the next digital phonorecord delivery rate adjustment proceeding pursuant to the schedule set forth in Sec. 255.7; provided, however, that any owner or user of a copyrighted work with a significant interest in such royalty rate, as provided in 17 U.S.C. 803(a)(1), may petition the Librarian of Congress to establish a rate prior to the commencement of the next digital phonorecord delivery rate adjustment proceeding. In the event such a petition is filed, the Librarian of Congress shall proceed in accordance with 17 U.S.C. 115(c)(3)(D), and all applicable regulations, as though the petition had been filed in accordance with 17 U.S.C. 803(a)(1).

#### **§255.7 Future proceedings.**

The procedures specified in 17 U.S.C. 115(c)(3)(C) shall be repeated in 1999, 2001, 2003, and 2006 so as to determine the applicable rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2001, 2003, 2005, and 2008. The procedures specified in 17 U.S.C. 115(c)(3)(D) shall be repeated, in the absence of license agreements negotiated under 17 U.S.C. 115(c)(3)(B) and (C), upon the filing of a petition in accordance with 17 U.S.C. 803(a)(1), in 2000, 2002, 2004, and 2007 so as to determine new rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2001, 2003, 2005, and 2008. Thereafter, the procedures specified in 17 U.S.C. 115(c)(3)(C) and (D) shall be repeated in each fifth calendar year. Notwithstanding the foregoing, different years for the repeating of such proceedings may be determined in accordance with 17 U.S.C. 115(c)(3)(C) and (D).

**§255.8 Public performances of sound recordings and musical works.**

Nothing in this part annuls or limits the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under 17 U.S.C. 106(4) and 106(6).

Dated: January 29, 1999.

**Marybeth Peters,**  
*Register of Copyrights.*

**James H. Billington,**  
*The Librarian of Congress.*

[FR Doc. 99-3119 Filed 2-8-99; 8:45 am]

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